

On November 21, 1988 appellant, then a 36-year-old distribution/window clerk, filed an occupational disease claim alleging that he sustained lateral epicondylitis due to factors of his federal employment. The Office accepted his claim for right lateral epicondylitis. Appellant

experienced recurrences of disability on April 11 and August 1, 1989. He stopped work on September 21, 1989 and did not return. On January 10, 1990 the Office placed appellant on the periodic rolls.

By letter dated February 16, 1990, appellant informed the Office that he had resigned from the employing establishment effective January 12, 1990. He noted that he received a compensation check for the period January 14 to February 10, 1990. Appellant asked his claims examiner whether he was entitled to receive the compensation payment and asked whether he should return the payment. On February 28, 1990, the Office, in response to his February 16, 1990 letter, informed him that he could continue to receive and cash compensation payments for disability as long as he had a work-related condition.

On July 30, 1990 the Office noted that appellant began working in nonfederal employment beginning January 29, 1990. By letter dated December 26, 1991, the employing establishment indicated that he had resigned from the employing establishment on January 12, 1990 but continued to receive compensation checks until July 28, 1990. The record establishes that the Office paid appellant compensation from January 14 to July 28, 1990.

On July 18, 2006 the Office notified appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$4,303.95 for the period January 29 to July 28, 1990 because he resigned from the employing establishment on January 12, 1990, began working in nonfederal employment around January 29, 1990 but continued to receive compensation for total disability until July 28, 1990. It found that he received \$686.36 in gross compensation for the period January 14 through February 10, 1990 and \$4,118.16 in gross compensation for the period February 11 through July 28, 1990. The Office calculated the amount it owed appellant for the period January 14 to 28, 1990 based on his pay rate in effect on April 11, 1989, the date he sustained his initial recurrence of disability. It determined that he was entitled to \$500.57 for the period January 14 to 28, 2007 and received \$686.36 for the period January 14 through February 10, 1990. The Office subtracted \$500.57 from \$686.36 to find an overpayment of \$185.79. It added the overpayment for the period January 14 through February 10, 1990 of \$185.79 to the overpayment for the period for February 11 through July 28, 1990 of \$4,118.16 to find a total overpayment of \$4,303.95. The Office further advised appellant of its preliminary determination that he was not at fault in the creation of the overpayment. It requested that he complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, the Office notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a precoupment hearing.

On July 27, 2006 appellant telephoned an Office claims examiner and indicated that he had informed the Office by letter dated February 16, 1990 that he continued to receive compensation even though he had resumed work. He received a February 28, 1990 reply from the Office advising him that he was entitled to the checks because he still had a work-related condition. The claims examiner acknowledged that both February 1990 letters were in the case record and that the information provided by the Office on February 28, 1990 was not correct.

On September 2, 2006 appellant requested a decision based on the written evidence. He asserted that he was without fault in creating the overpayment as he relied upon information

provided by the Office in its February 28, 1990 correspondence. Appellant completed the overpayment recovery questionnaire and submitted supporting financial documents.

On December 10, 2007 the Office held a telephone conference to verify and update appellant's financial information. Appellant provided his income and described in detail his expenses. He received \$7,757.64 in income and had monthly expenses of \$6,688.00. Appellant also paid \$355.00 monthly on credit card balances.

By decision dated January 11, 2008, the Office finalized its finding that appellant received an overpayment of compensation in the amount of \$4,303.95 for the period January 29 to July 28, 1990 and that he was not at fault in creating the overpayment.¹ The Office noted that he provided an overpayment questionnaire on September 2, 2006 and updated financial information on December 10, 2007. It stated:

"The information provided was *insufficient* to justify waiving recovery of the overpayment.

"It has been determination that you were found without fault in the creation of the overpayment however you should have been reasonably aware that you were not entitled to the continued total disability payment(s) for time loss for all work received by you *after* you resigned from federal employment and began other employment elsewhere.

"You have not provided justification for this Office to waive recovery of the overpayment." (Emphasis in the original.)

The Office determined that he should forward \$120.00 per month to the Office to repay the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of the Federal Employees' Compensation Act² defines the limitations on the right to receive compensation benefits. This section of the Act provides that, while an employee is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.³ The Office's regulations state in pertinent part: "compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury."⁴

¹ The Office initially finalized the overpayment determination on January 10, 2008. It found however that the January 10, 2008 decision did not accurately reflect the interest due on the debt and reissued a decision on January 11, 2008.

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8116(a).

⁴ 20 C.F.R. § 10.500.

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained right lateral epicondylitis due to factors of his federal employment. He experienced intermittent periods of disability until September 21, 1989, when he stopped work and did not return. The Office paid him compensation for total disability. Appellant resigned from the employing establishment on January 12, 1990 and began working in nonfederal employment around January 29, 1990. He does not dispute that he received an overpayment of compensation. The Office continued to pay him compensation for total disability until July 28, 1990. As appellant received compensation for total disability after he resigned from the employing establishment and returned to work with a nonfederal employer, he received an overpayment of compensation.⁵

The Office calculated the amount of the overpayment by subtracting \$500.57, the amount it owed appellant for the period January 14 through 28, 1990 based on his recurrent pay rate, from the amount that it paid him from January 14 through February 10, 1990, \$686.36, to find an overpayment of \$185.79. It added the \$185.79 to \$4,118.16, the amount that it paid him for the period February 11 through July 28, 1990, which yielded \$4,303.95. Appellant does not challenge the amount of the overpayment. The Office determined that he received an overpayment of \$4,303.95 and the Board finds that this correctly represents the amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act⁵ provides that an overpayment must be recovered unless “incorrect payment has been made to an individual who is without fault *and* when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.”⁶ (Emphasis added.) Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. The Office must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.⁶

Section 10.436 of the implementing federal regulations⁷ provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause undue hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses and outlines the specific financial circumstances under which recovery may be considered to “defeat the purpose of the Act.”

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and when an individual, in reliance on

⁵ *Id.*

⁶ 5 U.S.C. § 8129.

such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.⁷

5 U.S.C. § 8124(a) provides: “The [Office] shall determine and make a finding of facts and make an award for or against payment of compensation.” The Office’s regulations provide that an Office decision “shall contain findings of fact and a statement of reasons.”⁸ The Office decision should contain a discussion of the issues, requirements for entitlement, a background framework so that the reader can understand the issues at hand, a discussion of the relevant evidence, a basis for the decision and a conclusion.⁹ Office procedures further specifies that a final decision must provide clear reasoning which allows the claimant to “understand the precise defect of the claim and the kind of evidence which would overcome it.”¹⁰ Thus, a final decision must include findings of fact and a description of the basis for the findings so that the parties of interest will have a clear understanding of the reasoning behind the decision.¹¹

ANALYSIS -- ISSUE 2

The Office made a preliminary determination that appellant was without fault in creating the overpayment. Appellant submitted detailed information regarding his income and expenses as well as financial documents supporting his request for waiver. The Office held a telephone conference on December 10, 2007 and obtained additional financial information. In its January 11, 2008 decision finalizing the overpayment of compensation and denying waiver, the Office concluded, without explanation, that the information obtained through the telephone conference was not sufficient to establish waiver. The Office decision did not discuss appellant’s income and expenses or any of the evidence submitted by him in support of his request for waiver. It is required to make findings of fact and a statement of reasons regarding the material facts of the case.¹² The Office’s finding in its January 11, 2008 decision is not sufficiently detailed so that appellant or the Board can understand the reasoning behind the denial of his request for waiver.¹³

The Office noted that, while it had determined that appellant was without fault, he should have been aware that he could not receive disability compensation after he resigned and began working for another employer. This is not the standard for evaluating whether appellant is entitled to waiver when he is without fault in creating the overpayment. If the Office wants to change the fault finding, it must reissue a preliminary determination finding that the claimant is

⁷ 20 C.F.R. § 10.436.

⁸ *Id.* at § 10.126.

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4 (March 1997).

¹⁰ *Id.*

¹¹ *Paul M. Colosi*, 56 ECAB 294 (2005).

¹² 20 C.F.R. § 10.126; *Beverly Dukes*, 46 ECAB 1014 (1995).

¹³ *See Paul M. Colosi*, *supra* note 11.

with fault prior to finalizing a fault finding.¹⁴ The case is, therefore, remanded to the Office for an appropriate determination with adequate findings and reasoning regarding whether appellant has established waiver of the overpayment.

CONCLUSION

The Board finds that appellant received an overpayment of \$4,303.95 because he received compensation for total disability after he resigned from the employing establishment. The Board further finds that the case is not in posture for decision regarding whether the Office properly denied waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 11, 2008 is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 25, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹⁴ See 20 C.F.R. §§ 10.431(a), (b), (d); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(a)(1) (May 2004).